

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1919.

No. 3279 **578**

HARRY DEAN, APPELLANT.

vs.

H. KOPPERS COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MAY 20, 1919.

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1919.

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HARRY DEAN, APPELLANT,

vs.

H. KOPPERS COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3279.

HARRY DEAN, Appellant,

vs.

H. KOPPERS COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

At Law. No. 59371.

HARRY DEAN, Plaintiff,

vs.

H. KOPPERS COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Amended Declaration.*

Filed January 22, 1918.

In the Supreme Court of the District of Columbia.

Law. No. 59371.

HARRY DEAN, Plaintiff,

vs.

H. KOPPERS COMPANY, a Corporation, Defendant.

Now comes the plaintiff by his attorney and by leave of Court for this purpose first had and obtained, amends his declaration by substituting in lieu of the count thereof, the following, to wit:

The plaintiff, Harry Dean, sues the defendant, the H. Koppers Company, a corporation, for that, whereas, heretofore to wit, the de-

fendant was at the time of the commission of the grievances herein-after mentioned, a body corporate, duly incorporated under and by virtue of the laws of the — and for a long time prior thereto was, and still is, such body corporate; that whereas it then and there was the business of the said defendant, among other things, to construct, repair and build tanks and other equipment connected with the manufacture of gas, and was at the time of the grievances herein-after mentioned engaged in the construction, and improvement of the tanks and gas appliances and machinery of the Washington Gas Light Company, located in the City of Washington, District of Columbia, and to that end employed workmen in and about the repair,

2 construction and building of said tanks or machinery of the manufacture of gas aforesaid, and to supply tools, machinery and appliances for the use of the said workmen so employed in the repair, construction and building of said tanks or gas machinery and appliances; and whereas heretofore, to wit, on or about the 14th day of June, 1916, the defendant was constructing, building or repairing a tank, or engaged in the construction, building and repairing of the machinery of the Washington Gas Light Company in the City of Washington, District of Columbia, at or about the neighborhood of 25th Street, H Street and Virginia Avenue, Northwest, in the said City and District, and while the defendant was carrying on its said business in the manner aforesaid, at the time aforesaid, the plaintiff was then and there in the employment of the said defendant as a laborer, and as such laborer was employed on work of the defendant as aforesaid, but the plaintiff says that on the date aforesaid he was ordered and directed and required by the defendant to stop his said work as aforesaid and to assist in the moving of a large and heavy wagon which was then standing adjacent to the defendant's place of operations as aforesaid, and with other employees of the defendant, was ordered and directed and required to move the said large and heavy wagon a considerable distance along the public highway and to a point further away from the place where the wagon was then located, which said work this plaintiff was not engaged to do and was not accustomed to do. That said wagon as a part thereof had a certain long and heavy wagon tongue, and was made and designed to be drawn by two or more horses, but there were no horses

3 provided for moving said wagon on the occasion complained of, and notwithstanding that it was the duty of the defendant in the premises to detail a sufficient number of its employees to assist this plaintiff in moving the said wagon in the absence of horses, or to fully advise and notify this plaintiff of any possible danger to him which might result from obeying its said orders, nevertheless, defendant in utter disregard of its duty to this plaintiff as aforesaid and by and through its foreman in charge of plaintiff, said foreman acting for the defendant in this regard, gave this plaintiff positive instructions, directions and orders to take hold of the said wagon tongue and guide and pull the same at the same time that certain other employees were ordered and directed to push the body of the said wagon along the said street, and it was then and there the duty of the defendant to detail a sufficient number of workmen to

assist this plaintiff in guiding and pulling the said wagon tongue and in holding it straight on the course and preventing it from suddenly swerving, and the said plaintiff, acting solely because of said positive instructions, directions and orders of the foreman aforesaid did take hold of said wagon tongue without knowing and without having any reason to know that he would be unable to hold it if it was caused to suddenly swerve, and did, to the best of his ability guide and pull the same along the said public highway while it was being pushed by the other said employees and while so doing, and without fault or negligence on his part, and because of insufficient help to assist him in so guiding and pulling the tongue and without warning from the said foreman or anyone for the defendant, one of the wheels of said wagon ran against a brick or stone or other obstruction on the said public highway and caused the tongue of said

4 wagon to be swerved or moved around suddenly and violently against the left leg of the plaintiff, causing it to be broken at or about, or a little above the knee, and also causing an injury to the plaintiff's left elbow. That the plaintiff was also caused thereby to suffer a severe nervous shock to his whole system and all of said injuries to plaintiff's leg, elbow and nervous system as aforesaid were and are of a permanent character; that plaintiff was also caused to lose his wages for a long period of time, which said loss amounted to the sum of — Dollars, and that he was otherwise greatly shocked, bruised, maimed and damaged to the extent of \$10,000.

Wherefore, plaintiff brings this suit and claims of the said defendant the sum of \$10,000 besides the costs of suit.

EDWARD S. DUVALL,
Attorney for Plaintiff.

Plea.

Filed April 19, 1918.

* * * * *

For plea to the amended declaration, the defendant says that it is not guilty in the manner and form alleged therein.

FRANK J. HOGAN,
WM. H. DONOVAN,
Attorneys for the Defendant.

April 18, 1918.

5

Joinder of Issue.

Filed April 22, 1918.

* * * * *

The plaintiffs join issue on the plea of the defendant filed in the above entitled cause.

EDWARD S. DUVALL,
Attorney for Plaintiff.

Amendment to Amended Declaration.

Filed February 20, 1919.

* * * * *

Comes now the plaintiff, and by leave of court for this purpose first had and obtained, amends his amended declaration in the above-entitled case, as follows, viz:

Page 3, line 4, after the word "plaintiff," last occurrence, insert—

was and is thereby caused to suffer a permanently reduced or restricted movement and flexing of the knee-joint of said limb, and a stiffness of said joint, whereby he has become lame in said limb, and—.

EDWARD S. DUVALL,
Attorney for Plaintiff.

Memorandum.

February 25, 1919.—Verdict for Defendant.

6 Supreme Court of the District of Columbia.

Friday, March 7th, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record and thereupon, plaintiff's motion for a new trial filed herein, is submitted to the Court. Upon consideration whereof, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff take nothing by this action; that the defendant go hence without day, be for nothing held and recover of the plaintiff its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the plaintiff by his said attorney, in open court, notes an appeal to the Court of Appeals; whereupon the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars.

Memorandum.

March 18, 1919.—Appeal bond approved and filed.

Assignments of Error.

Filed March 22, 1919.

* * * * *

Now comes the plaintiff in the above entitled cause, and, in connection with his appeal from the judgment rendered against him herein, assigns the following errors committed in the trial of said cause, upon which he relies to reverse said judgment:

The trial court erred:

1. In refusing to permit plaintiff to give evidence that there were skilled mechanics in his gang and the kind of work they were doing.

2. In refusing to instruct the jury as requested in plaintiff's prayer No. 1.

3. In refusing to instruct the jury as requested in plaintiff's prayer No. 1a.

4. In refusing to instruct the jury as requested in plaintiff's prayer No. 2.

5. In refusing to allow plaintiff's counsel to argue to the jury that plaintiff was employed to do one kind of work and was injured while obeying the foreman's order to do work not contemplated in his contract of hiring, as bearing on the question of assumed risk.

6. In instructing the jury that there could be no recovery under the first ground of negligence alleged in the declaration, namely, that plaintiff was hurt while doing some work which he was not engaged to do and defendant did not warn him of the risks thereof; but that the moving of the heavy wagon was work contemplated in his contract of hiring and he assumed all of the natural and obvious risks incidental thereto.

8-9

EDWARD S. DUVALL,
Attorney for Plaintiff.

Receipt of copy hereof on this 22nd day of March, 1919, is hereby acknowledged.

FRANK J. HOGAN,
ROGER J. WHITEFORD,
W. H. DONOVAN,
Attorneys for Defendant.

Designation of Record on Appeal.

Filed March 22, 1919.

* * * * *

To the Clerk of the Supreme Court of the District of Columbia:

Please prepare the transcript of record on appeal in this cause, and include therein the following, to wit:

1. Amended declaration.
2. Plea to amended declaration.
3. Joinder in issue.
4. Amendment to amended declaration.
5. Memo. of verdict.
6. Judgment on verdict.
7. Memo. of appeal taken in open court and appeal bond.
8. Bill of exceptions.
- 10 9. Assignments of error.
- This designation.

EDWARD S. DUVALL,
Attorney for Plaintiff.

Receipt of a copy of the foregoing on this 22 day of March, 1919, is hereby acknowledged.

FRANK J. HOGAN,
Attorney for Defendant.

Memorandum.

March 27, 1919.—Notice of submission of Bill of Exceptions and service of same, filed.

Supreme Court of the District of Columbia.

Thursday, April 17th, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon plaintiff's attorney submits to the Court, the Bill of Exceptions, taken at the trial of this cause, and prays that the same be signed and made of record, nunc pro tunc, which is hereby accordingly done.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59371 at Law, wherein Harry Dean is Plaintiff and H. Koppers Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of April, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,
By W. E. WILLIAMS,
Assistant Clerk.

12 In the Supreme Court of the District of Columbia.

At Law. No. 59371.

HARRY DEAN, Plaintiff,

vs.

H. KOPPERS COMPANY, a Corporation, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial before Mr. Justice Stafford and a jury on, to wit, February 20, 1919, and thereupon the plaintiff to maintain the issues on his part joined, gave evidence tending to prove as follows:

The plaintiff testified that he was 38 years old and was born in McKeesport, Pa.; that he was first employed as a mechanic's helper in steel working, serving about four years, afterwards working in another position doing steel work in mills; enlisted in the Marine Corps, serving eight years and was discharged at Navy Yard, Washington, D. C., in 1913; remained here about a year and a half after his discharge; was in Washington later on and being out of work and hearing that defendant was taking on hands he applied for a position; saw Mr. Morris, the master mechanic, and asked him for a position and he said "all right"; he asked Morris would he put him to work

and what the wages were and was told by him thirty cents an hour; Morris took his name and put him in gang of about seven other men; at that time defendant was putting up big iron tanks at 25th and Virginia Avenue and H Streets, northwest, three tanks; that "we were putting up tanks first"; and thereupon said witness was asked the following questions and made the following replies:

Q. Were you told by Mr. Morris what work you were to do when he employed you?

13 A. Yes, sir.

Q. What did he say?

A. He told me he would put us in charge of another gang. He said we were just to help around the tanks and the machinery that was going up and to do what the foreman told us to do.

And thereupon the said witness further testified that at the time he was hired, said Morris also hired some other men, and he was in a tool shed the defendant had on Virginia Avenue when hired; Morris hired four men that morning; that was about June sixth; from that date until the accident witness worked for Mr. Morris, working as mechanic's helper, doing most anything he told us; that on June 14th, 1916, said witness was at 25th and H streets, taking a big tank off a wagon and putting it in the building located there; the defendant wanted it taken off the wagon and said Morris called us out, about eight or nine in the gang, mechanics' helpers and laborers, to take it off and to move the wagon; that after the tank was removed said Morris touched said witness on the shoulder and said, "You go up to the tongue and take hold of the tongue," and another man by the name of Warner was also sent up there to the tongue; Morris told them to take it on 25th street and go north with it to H street, which is a short distance; witness was on the right hand side of the tongue, the front part of tongue, and Warner was on the left hand side, opposite to witness, both holding it with their hands; the other men in the gang were at the sides and rear of the wagon, pushing it, and said Morris was also helping to push it; from the time they started with the wagon until the accident to witness occurred, Morris was on the back of the wagon helping to shove it; that 25th street was concrete and smooth; that when they got to H street, said Morris ordered them to turn down H street to the west; this street was awfully rough, a cobblestone street; we had to take the wagon down it about

14 as fast as horses could trot; going down H Street, witness was holding the tongue as tight as he could; when half way down this street Morris hollered to turn, so we turned the wagon round to the left and going back east again "just how—whether the wagon turned around on us I don't know,"—the first witness knew the tongue swung over and hit him on the left knee and knocked him on his back; he laid there for a few seconds when they picked him up and carried him over in the office where he remained until the hospital ambulance took him to Emergency Hospital; this was the first time that Morris had ever ordered witness to move a wagon and when he was ordered on this occasion to take hold of the tongue with Warner and assist in moving the wagon he didn't think there was any

danger up there when he, Morris, told him to do it; the first time the witness thought he was in danger was when they commenced to go down H Street and the other men commenced to run with it; he was then scared to let go of it; and thereupon the witness was asked the following questions and made the following responses:

Q. State whether any other instructions or directions were given you than you have already stated.

A. No, sir; there was no instructions given; only to turn the wagon around and come east on H Street with it. We didn't get them instructions until the wagon turned; and he helped to turn around there.

Q. Where was Mr. Morris from the time they started with the wagon until the time the accident occurred?

A. He was on the back of the wagon, helping to shove the wagon.

The Court: Was he saying anything?

The Witness: No, sir; I didn't hear him say anything, only when he hollered to me to make the turn, when I commenced to make the turn.

And thereupon the witness further testified that there were only two men at the tongue; one on one side and one on the other
15 and about six or seven on the back of the wagon; that the body of the wagon was about 15 feet long, the tongue about 9 or 10 feet long, and the wagon weighed about 1900 or 2000 pounds, the tongue being about 3 feet from the ground; the wagon was unloaded at time of accident; and that the tongue kept swinging back and forth a little bit as it was going down H street on the cobblestones.

On cross-examination said witness testified that he had worked mostly at the steel trade, beginning when 12 years of age at McKeesport, Pa., carrying little paper slips from steel works to laboratory; had worked at loading ice on wagons for an ice company there; at times went out with wagons to take ice into houses; he was then asked "Did you ever drive horses," and answered, "Yes, sir. Q. So you are familiar with the operation of a wagon? A. Driving horses, yes sir. Q. How long did you do that? A. About two years." He further testified that he worked as conductor for the Capital Traction Company in Washington for six months in the early part of 1914; then returned to McKeesport and worked in the Seamless Tube Works for about seven months at \$1.75 a day; then worked for the McKeesport Ice Company at \$2.25 per day; then returned to Washington and his next job was with the defendant at 25th and H streets, at 30 cents an hour; after his recovery he worked for Capital Traction Company again as conductor and then as a watchman in the Treasury Department; when he sought employment of the defendant he saw Phillip Morris, who employed him; did not know two men named Morris ever worked for defendant and never saw but one by that name and he the one who employed him; never knew a Mr. Ackerman there; there was a pipe-fitting gang under a foreman, whose name he did not recall; the following questions were then propounded to and answered by the plaintiff:

Q. When you went there and were put to work, what kind of work did you do? A. I was hired as mechanic's helper——

Q. I am not concerned with what you were hired for. What did you do? A. Anything whatever I was told to do—carried
16 lumber——

Q. What else? A. Unloaded wagons.

Q. Anything else? A. Helped block up tanks.

Q. What did you have—pulleys and a derrick? A. We had jacks, jacked up the tank; and to take this here tank off the wagon we had a thing to wind up with.

Q. On this day in question there was a tank on one of these wagons of Littlefield, Alvord & Company, and you helped unload that? A. Yes, sir.

Witness then testified that the tank was not quite as tall as he and would be about four or five feet in diameter; Morris put his whole gang of 8 or 9 men on the work of removing this tank from that wagon which was on 25th Street parking and backed up with its rear against building where there was a door; the building sat in a triangle formed by the said three streets; thinks 25th street was smooth in center where car track was and rest of roadway either macadam or Belgian blocks, but not as smooth as macadamized road, and not rough like H Street; where they took the wagon off was Belgian blocks; he held tongue as it came down over curb and felt it sway a little then, and also when they turned onto the car tracks; and thereupon the witness was asked the following questions and made the following replies:

Q. You knew, didn't you, that the front wheels of a wagon turn with the tongue, loose, on a coupling pin? A. I didn't know there was any danger, or anything else in the——

Q. I am not talking about danger, sir. You know that in order to keep the front wheels straight you have to hold the tongue, don't you? A. Yes, sir.

Q. And you knew, didn't you, that when you struck the rough places in the street, that makes this pressure on the tongue and you felt that, did you not? A. I didn't feel any pressure when we went down off the curb. I couldn't tell you whether they had any blocks
of wood up there or not.

17 Q. You say when you crossed over the curb to the car track, over these Belgian blocks, they were not as smooth as asphalt. Did you not feel the wheels going over these blocks as you were holding that tongue? A. It kind of made the tongue feel rough, yes, sir.

And the witness further testified that he made no protest at any time about holding the tongue; that they did not cross the car track at all with the wagon; that he did not notice the cobblestones on H Street until we were on H Street; didn't take that much notice, because he didn't know how far down H Street they were going to take it, and when they first started nothing was said about going down H Street; this was said when they got to the corner; he heard somebody holler in the back, holler to turn down H Street, and when they got down H about half way between 25th and 26th

Streets again holler to turn; he knew that Morris was on the back of the wagon, because he was the one he heard holler; he did not see Morris there, as he never looked back; but Morris had told him he would be at the back of the wagon; that he had not seen Morris from the time he told plaintiff he would be at the back of the wagon until he saw him in the office after the accident; never had had any work of this kind to do before—to handle a tongue; in driving the ice wagon had seen the front wheels hit a stone and the horse's breast chains hold the tongue; knew that happens, but did not know the same thing would happen if they struck a stone and didn't know there was any danger or he would not have gone up there; knew from experience in driving an ice wagon for two years that if the front wheel of a wagon struck a stone it would turn the tongue from you or away from you; he could not be mistaken that Morris told them to move the wagon, he was the foreman and the only man he ever saw keeping their time—never knew any other Morris there;

18 did not know Mr. Clauss; knew there was a superintendent, but didn't know his name; there were many different bosses, but none were ever introduced to him by name and he did not know the name of any of them, except the one he worked for—Mr. Morris; there was a gang of pipefitters under a foreman, and his gang was under a foreman; there was a gang of riveters and boilermakers—four or five different gangs altogether working there, each with its own man ahead of them, each its own foreman; each group of 6 or 8 or 10 men had its foreman; went to work at 7.30 that morning and they commenced to move the wagon around six or ten minutes after six that evening; ten hours constituted a day's work but sometimes they worked only nine, just whenever the whistle blew—sometimes they worked more than ten; the day's work stopped about 4.30 P. M.; they were working overtime the evening of the accident and didn't know whether the fellows had anything more to do after moving the wagon.

And thereupon on redirect examination the witness was asked the following question and made the following reply:

Q. Were there any skilled mechanics in your gang? A. Yes, sir.

Whereupon counsel for defendant objected and the following occurred:

Mr. Duvall: If the Court please, on cross-examination counsel went into the question of what work this man had done. He has testified there were mechanics in this gang, and I am now going to ask him in rebuttal as to the work that these skilled mechanics were doing in that gang, so as to fix the character of the work that he was supposed to do when he was employed.

The Court: He said himself he was hired to do anything they told him to do. I do not think that would be proper.

Mr. Duvall: Your Honor will allow me an exception?

The Court: If you care to press the objection, Mr. Whiteford, I think you would have a right to have it sustained.

19 Mr. Whiteford: Yes, sir.

The Court: It will be excluded and an exception noted.

And thereupon the witness further testified that he had become familiar with Morris' voice and recognized it to be his voice when he called to make the turn.

ANDREW J. BIGGS, white, testified that he was employed by defendant in 1916, and was so employed in June, 1916; that he was a pipefitter's helper; does not remember who was the man who employed him, but he was employed by the H. Koppers Company. "We had three or four gangs there, and I was hired by a man and they turned me over to Mr. Morris;" that Mr. Morris was a master mechanic. Thereupon the following questions were asked and the following answers given by witness:

Q. What work did he do? A. He had charge of the tanks, raising the tanks on the building. Practically he had charge of the whole business.

Mr. Whiteford: I move to strike that out, if your Honor please. It seems to me that would be an opinion of this witness that he had charge of the whole business. It has already been testified to that there were several foremen, each in charge of a gang.

The Court: Who is he speaking of?

Mr. Whiteford: Phillip Morris. He said they had a foreman in the erection of the tanks and he had charge of the whole business.

The Court: If he means by that that he saw him give directions as to all parts of the work, that would be a fact that he could testify to, I suppose; but his opinion or inference about it of course would not be admissible.

Mr. Duvall: I of course cannot tell—I think that is the expression of a layman as to what he observed of the man's connection with the work. I will go into that.

The Court: You had better clear that up.

20 Mr. Duvall: I will.

By Mr. Duvall:

Q. What did you ever see him doing around there? A. I saw he had charge——

The Court: What did you see him doing?

The Witness: He was the general boss or master mechanic around there, and he had charge of all the men around there.

Mr. Whiteford: Now, if your Honor please, I move to strike that out.

By Mr. Duvall:

Q. What did he do? A. He was raising tanks.

Q. What else did he do that gave you the impression that he had charge? A. The plant was for this war business, and he had charge of the pipes and everything there.

Q. I know; but, Mr. Biggs, you probably do not understand me——

Mr. Whiteford: I think that should go out of the record.

The Court: It will not be considered in unless it is justified by the facts in the case.

Witness then testified that Morris had told them to raise tanks and had charge of that, and the pipework around there, he had charge of that too; that he heard said Morris give orders frequently, he was always on the rush, shoving the men all the time; that was the occurrence daily—all the time, he was hollering at the men, rushing the job right along all the time.

By the Court: You mean all parts of the work?

Witness: Yes, sir, Judge, your Honor.

And the witness further testified that defendant never had any teams of its own in its business there and that the hauling on that job was done by Littlefield & Alvord; that he was employed there nearly two months, and was paid 30 cents an hour; that he
21 remembered Dean working there and was a witness to the accident to Dean, witness being behind the wagon at the time; and thereupon witness was asked to state what occurred and he answered:

A. The wagon was facing south on 25th street; the wagon tongue was facing south on 25th street. The wagon tongue was turned around toward the south, and Mr. Phillip Morris told us to grab hold of the wagon, take the wagon around on H street. He didn't place us in any position at all, just told us to grab the wagon and take the wagon around——

Q. Where were you? A. On the back of the wagon.

Q. Where was he? A. Mr. Phillip Morris? On the back of the wagon, sir.

Q. State what followed. A. He said to grab hold of the wagon, take the wagon around H Street. So naturally, we grabbed hold of the wagon. He didn't place us in no position at all. Mr. Dean and Mr. Warner, they got hold of the tongue of the wagon. We turned the wagon tongue around north—around east. Then we went north and then turned south. We went down H street between 25th and 26th, and Mr. Phillip Morris kept saying, 'Hurry up; hurry up; push the wagon.' He kept driving us right along, and we shoved the wagon right off. H Street is kind of downgrade. It is all cobble rocks. It is paved, but there is ruts in the street, and some rocks are higher than the others; and just as we made the turn, Mr. Phillip Morris hollered for us to make the turn, and just as we made the turn around H Street between 25th and 26th we had the wagon on a horse trot, and just as we made the turn the front right wheel got caught in a rock——

Mr. Whiteford: In a what?

The Court: In a rut.

22 The Witness: It is awfully rough there. So the front right wheel got caught in this rock. Some rocks are higher than the others; and just as we made the turn the front right wheel got caught in there and the tongue struck Mr. Dean on the leg and threw him right over the top of the wagon and landed him on the sidewalk. I didn't see the other man."

Witness further testified that Morris was there helping to push all the time; 25th street was paved in cement and right rough; there were two men on the tongue and four men pushing; Morris was pushing in the center of the wagon, on the right side, and witness on left hand side; same Morris put witness on that work, pushing the wagon and when Morris told him to do that work witness was in the building and we had just taken a heavy tank off the wagon; Dean was working with them; when Morris was talking to witness in the building, Dean was in the building too; the horses had been taken out of the wagon by the driver after it came to the building loaded with this heavy tank and the driver left the wagon and took the horses to the stable; it was one of Littlefield & Alvord's great, big, long heavy truck-wagons, about 30 or 40 feet long, tongue about 20 feet; this was in the evening; when the wagon was being moved by Morris and his men it was empty; after the accident, Dean was taken into the office and Morris ordered the rest of the men to go back to the building and go to work; we returned to work and Morris came back over into the building.

On cross-examination the witness testified that he went to work for defendant in June, 1916; he does not know who hired him; that there were three or four gangs there and three or four foremen; he went in as a pipefitter's helper; had never done any of that kind of work before; he was helping the pipefitters around the yard until another foreman sent him with Mr. Phillip Morris on the
23 tank business; Morris was a stranger, he had never seen him before; worked in the pipefitters' gang about two weeks, running pipes around the yard, carrying pipes from the vise to the job, generally, any laboring work that was necessary to be done in connection with the work the pipefitters were doing, anything a pipefitter's helper would do; we were supposed to carry boards or lumber, or anything; did not recall the name of foreman of pipefitters; we had three or four gangs there and different foremen, there were three or four foremen there; there was a gang of riveters with a foreman, then there was this gang that was erecting these tanks, the gang that Mr. Morris was handling; was hired in June but could not tell what day they changed him over from pipefitter's helper to Mr. Phillip Morris' gang raising these tanks; in this gang the work he did was raising tanks, putting tanks up on the ceiling, a number of them, but only three like the one they took off the wagon, and we had to tighten these bolts and nuts on these stills; we were supposed to do anything around there and Mr. Dean was doing the same kind of work he was; Morris was keeping the men at work and pushing them along, he kept rushing us all the time, it was a hurry-up job, prac-

tically and they were just shoving the men all the time on that job; had no experience in that; Morris did not help to take tank off the wagon, he had charge of directing which way the work should go and the tanks, and all; Morris never took hold of a pipe, he was just bossing around, he never saw him put his shoulder to help lift anything, no lifting, only helped to push the wagon; they took the tank off wagon with a nigger-head, kind of a big thing, a spool and you had men on the inside pulling this spool, dragging this tank off, believe it is called a windlass; Morris did not help wind that windlass.

Thereupon questions were asked and the witness replied thereto as follows:

24 Q. You said that Mr. Morris said to take the wagon down on H Street? —. Yes, sir; to take the wagon down on H Street.

Q. He did not tell anybody whereto go on that wagon at all, or what to do? A. No, sir; he didn't place us at all.

Q. Just said, 'Boys, take the wagon out'—— A. 'Boys, take the wagon on H Street.'

Q. He did not tell you where to get on the wagon? A. No, sir.

Q. He did not tell Mr. Dean where to get on the wagon? A. No, sir."

And witness further testified as follows: Morris was there all the time; he was on the back of wagon, not on the side, as witness was misunderstood to say; it was a flat top wagon; when they got in H street they made a left-hand turn to get on south side, attempted to turn the wagon south; they were going to leave the wagon on the south side of H street, with the tongue pointing East; Dean was on right hand side of tongue; did not know Mr. Ackerman, never knew a man in this gang by that name; never saw Mr. Clauss there, never knew him, they were all strangers to him, did not know anyone but Mr. Morris; never saw anyone around there during the work, generally, over the whole place, telling Mr. Morris what to do or telling the foreman of the steamfitters what to do, never saw anyone of that sort; might have been a man around there; didn't know anybody at all; they were strangers to us, don't recall two Morris'es there, only knew Mr. Phillip Morris, he was the only one, he was the master mechanic, he kept their time and he was the one that gave orders about moving this wagon; it was nearly three or four weeks after he, the witness, was transferred to Phillip Morris' gang, that the moving of this wagon occurred; it was long before June that he went to work there for defendant, it was about May, he guesses; he worked in steamfitters gang about two weeks and then they changed him over to Morris; asked, "You do not know who hired you,"

25 witness replied "No, sir; three or four gangs there, sir. We shifted from one to the other, sir."

Morris was still there when we left, which was before the job was completed; went back to his trade, tinning.

And thereupon plaintiff's wife was called as a witness and testified concerning the plaintiff's pain and suffering while at the hospital and after his return to his home; that she went to Dean's place of employment, after the accident, for his pay and saw Mr. Phillip Morris, the manager; after her interview with him she went back there on the next pay day and was given a check for his pay, check of the H. Koppers Company, had "Pittsburgh, Pa." on it; the amount was \$30 but they owed her husband for one more hour so she went back and was given an additional check for 30 cents, both checks being signed by a Mr. Clauss; she had lived in the neighborhood of accident all her life and roadway of H street between 25th and 26th had not changed since date of accident; the stones are all uneven, lots of ruts in the street, and it goes down grade; 25th street is paved with Belgian blocks, it is more smooth than H street, but not exactly even; the car tracks run along there and between the tracks it is concrete; only one track there.

Medical testimony was adduced to show the nature and extent of the injury to plaintiff's left leg—fracture at the knee-joint and its permanent stiffness; and a lay witness, Plaintiff's father-in-law, testified that his and plaintiff's family visited one another frequently and he observed that plaintiff underwent pain and suffering on account of his leg injury and that he walked like a person who has a stiff movement on the knee-joint.

26 Thereupon counsel for the plaintiff announced his testimony closed.

Thereupon the defendant, to prove the issues on its part joined, produced as a witness JOSEPH A. CLAUSS who testified that he lives in Pittsburgh and is in the employ of defendant; that he was employed by defendant in 1916 and was doing work for it that year in Washington at the Washington Gas Light Company's west station at 25th and H streets; that he was also employed in this city in 1918, doing work for defendant, at the Gas Light Company's east works, 12th and M streets, southeast; that he was erecting engineer for defendant on the 25th and H street job in 1916, coming here to take charge of that work in May; that a timekeeper, P. K. Morris came with him and that the first part of June, P. J. Morris, came; P. J. Morris was foreman. As erecting engineer witness had full charge of the work, anything to be done, he saw that it was done; had plans, blue-prints and specifications as to what work was to be done; got them from main office at Pittsburgh; these were sent to us from time to time; some of the work was sub-let, the concrete and brick work to a company whose main office is in Pittsburgh and the two tanks to the Kenney Company; the tanks did not come assembled; for the first few days after they came here they just looked after the subcontractors until some of the apparatus arrived; it was necessary that the subcontractors' work should be done before the work he was going to do could be undertaken; that when he brought the foreman, Morris,

down here he was to work as foreman and he was foreman and he had a gang of men and this gang varied according to the amount of work that had to be done on that day or the next; Morris hired the men and witness paid them by check; that the money was deposited in a local bank and he drew the checks; he signed all checks with his own name; that witness had a foreman named McMasters who looked after the pipe-fitting; he had a squad of men under him who installed all the pipe-work; the defendant had an office across from the plant, on 25th street, and he was on the job continually, all day; that he gave the orders to Morris and McMasters for the construction work in behalf of the defendant; whenever changes made in his plans and blue prints necessitated changes in the construction from time to time, he ordered the changes; the defendant had approximately 20 erecting engineers in its employ, distributed all over the country; he remained here about two and a half months until the plant was completed and he turned it over to the Gas Company; Morris, the foreman, came here early in June and stayed about five weeks; witness left about the latter part of July; gave no orders to Dean or any other men to move the wagon and did not know that it was being done; their office was upstairs in a vacant house, with the office of Ross Engineering Company one of their subcontractors on the first floor; did not see the wagon being moved and first he knew of accident was when he saw Dean being brought in where office was; and he called the hospital for the ambulance.

On cross-examination witness was asked where he got the employes that assisted in the erection of the gas appliances on this job, aside from Morris and McMasters whom he brought from Pittsburgh, and he answered that they just came around on the job and Morris and McMasters would hire them as they required them; that Morris and McMasters would lay them off when they did not require them; asked if he had a superintendent there, witness replied that he was what they would call a superintendent; but they call them erecting engineers; that was his designation as superintendent and he had supervision as erecting engineer; the work defendant was doing there was the installation and erection of machinery, pumps, engines and tanks; some of this came from Pittsburgh and the rest from different parts of the country; they got from Washington, only a tank about three feet in diameter and about five feet long; they erected tanks on the outside of the building as well as inside and employed as many as fifty men at one time; just as the apparatus arrived we would put it in; did not start to install when he first came down from Pittsburgh about the middle of May; they had to wait until the Ross Company completed its work before they could install the apparatus; started from the time Morris came; Morris, P. J., has been in the employ of defendant about four years and is still in their employ; P. K. Morris was kept in the office entirely, as sort of material man and timekeeper; they had business relations with Littlefield and Alvord; they did work for defendant; after the accident he saw the wagon that caused the injury to Dean; thinks it weighed about 2,000 pounds.

On re-direct examination the witness testified that he made the contract with Littlefield & Alvord to do that work.

PHILLIP J. MORRIS testified that he lived in Pittsburgh and was then in the employ of defendant company; worked here for defendant at 25th and H street on Washington Gas Light Company job, don't recall when it was he came here, not just exactly, can't recall the date, believes it was in June; Clauss was here when he arrived; Clauss was erecting engineer; witness reported to Clauss; witness was foreman; being asked "where did you get your men. What did you do?" witness said he came here and hired some men in this city, went right along with the work and took his orders from Mr. Clauss; and thereupon the following occurred:

The Court: He wants to know something of the work that you did.

By Mr. Whiteford:

29 Q. What you did on the work yourself, if anything? A. Putting in tanks and setting pumps and machinery and line shafting.

Q. How many men did you have in your squad? A. About 17.

Q. Did you do any work yourself? A. Well, at times I did; yes, sir.

Witness then testified that he recalls that a wagon of Littlefield, Alvord and Company came to 25th and H street to the building there, with a tank on it and he unloaded it with a squad of men he had under him; after it was unloaded he never gave any orders to move the wagon, did not push the wagon or take hold and help push it up 25th street and around on H street and was not there nor did he see it done; the first he knew about an accident someone stated that a man was hurt and he was in the office at the time; saw the injured man in there; knew Dean and identified him in court as the one; asked to name any other men he had there, he gave the names of Bert Ackerman and Nick Sarrh; all told he stayed on the job five weeks; Clauss was still there when witness left.

On cross-examination witness testified that he is now working in Pittsburgh with the Koppers Company; is a foreman there; there were about 50 men, on an average, on the job at 25th and H streets; on the afternoon of the accident he was not in the office all the time; he was about the job; he was in various places; part of the time he was going around the work to see that it was being properly done; can't recall where he was about 5 o'clock; the usual knocking off time for the men was 5:30 but they were working over-time the afternoon of the accident; the work was being rushed as much as possible; and thereupon the witness was asked the following question and made the following reply:

30 Q. And you cannot recall where you were at 5:30 except that you were keeping an eye generally on the progress of the work? A. No; I couldn't state where I was at the time. I was in various places.

And the witness further testified that the afternoon of the accident he was in the office when it was reported and he met Dean right in the hallway; knows Warner and remembers seeing him in the hallway after the accident; don't recall Biggs but remembered him when Biggs was asked to stand in court for identification; Warner was working overtime that day and he supposed that Biggs was helping unload the tank from the wagon; witness put the men there to unload it and saw them doing it; couldn't state how large a tank it was nor how much it weighed; can't recall what time he saw it on the wagon; it was in the afternoon, couldn't say how late; asked if it was as late as 5 o'clock, replied he "wouldn't like to state any time," and thereupon the witness was asked the following questions and made the following answers:

Q. What work was being done in the afternoon of that day?

A. I couldn't state that.

Q. What work was your gang doing that afternoon? A. I couldn't say just what they were doing, but they were either setting machinery or unloading wagons; and so forth. That is a pretty hard thing to state right now.

Q. You say you were in the office at the time it was reported that someone was hurt? A. Yes, sir.

Q. Did you go out to the scene of the accident? A. The man was brought in, I met him right in the hallway.

Witness then testified that after the tank was off, he didn't order the men to do anything. And thereupon the witness was asked the following questions and made the following replies:

31 The Court: You mean they were through for the day?

Witness: Yes, sir.

The Court: All of them?

Witness: Yes, sir.

By Mr. Duvall: They could go home?

A. Yes, sir.

Thereupon the witness further testified that Mr. Clauss was in the office at the time of the accident; when Dean was brought in the lower hallway he was upstairs and when he went down there were about 10 or 12 of his men congregated there and he chased them out of the hallway to give the man air; all didn't go; a couple remained; did not know that the wagon was being moved or to be moved; when he last saw the wagon it was backed up to the doorway of the building; other wagons of Littlefield & Alvord's bringing material and machinery and appliances to the building, had previously been backed up to the sidewalk but never backed up to the building; there had been wagons of others up on the parking near the building and he had had them taken right away; there were no horses hitched to this particular wagon when the tank was being unloaded; he intended to leave it there against the building; the horses were always to the wagon and they unloaded it and the driver took the wagon away; he expected that Littlefield & Alvord would take it

away and relied on them to do so; it was an unusual thing to take the horses out of and away from a wagon that was to be hauled away after the material was delivered, but he did not inquire into it, did not inquire why it was being done; never saw the wagon on H street after the accident and did not go to the scene of the accident.

ALBERT G. ACKERMAN testified that he is in the employ of defendant and was in its employ when it was working at 25th and H street, in June, 1916; thinks he came here for that work in 32 June and in company with Phillip J. Morris; witness was under the construction department and the foreman of that department was Mr. Morris; there were possibly 20 men in that squad; recalls the occasion of a wagon being moved, the evening of June 14th, 1916, after a tank had been unloaded from it, and that someone was hurt while it was being moved.

Thereupon the witness was asked the following questions and made the following replies:

Q. Were you present when the tank was being unloaded? A. Yes, sir.

Q. Did you assist in unloading that tank? A. Yes, sir.

Q. In moving the wagon, did Mr. Morris give orders to move that wagon? A. No, sir.

Q. Do you recall who did suggest the moving of the wagon? A. I think I suggested moving it.

Q. Did you tell Mr. Dean where to take hold of the wagon? A. No, sir.

Q. Just tell what happened then, how the wagon was moved, and who moved it? A. Several of the boys got behind it, and some of them caught hold of the tongue and moved it. I could not say any farther than that, because I did not go with them.

Q. You did not go with them? A. No, sir.

Q. Did you take hold of the wagon yourself? A. No, sir.

Q. Did Mr. Morris go with them? A. He did not, no, sir.

Q. Did you see the accident happen? A. No, sir.

On cross-examination witness testified that he was a "pusher" under Mr. Morris; a pusher's work is overseeing a few men, or a dozen men, whatever men it may be, and he took his orders from Morris; when he ordered the men to move the wagon away it 33 was in front of one of the buildings, backed up to the door, with the horses unattached; did not order any particular number of men to move it; asked how many men he did take for it, he answered that he did not take any, he just said to the boys, "Get the wagon off of here as soon as you can." Asked where he found the boys, witness said they were all working, helping unload the wagon and they were right there at the door; don't remember how many; the office was on right hand side of street, can't recall name of street, but it was a cross street and not the one where the car track was; it was a short block where the office was located; office was in upper part of a two-story house; he did not keep the men's time, there was a time-keeper; gave the men no further instructions

after telling them to move the wagon; can't recall whether the men had finished their regular hours of work that day; it was possibly around 4:30 or 5 o'clock, the men were supposed to finish their regular hours of work at 5:30; timekeeper, whose name he does not recall, used the brass check system of keeping the men's time and was in the office; witness did not have to report his time to timekeeper; he came around on the job and checked us, he was there every day.

VALENTINE STADELMAN testified that he is an employe of defendant company and works in Pittsburgh; came here in 1916 to do some work for defendant at 25th and H streets but can't recall the date he came; came after Mr. Morris did; asked in what gang he worked; he said in the gang of Mr. Morris, directing all equipment; judge there were about 25 or 30 men in that gang; there was another gang, under Andy McMasters, pipefitters; was present on June 14, 1916, when a wagon was unloaded and afterwards moved; we unloaded the tank and we knew the wagon had to be taken off the street, off the pavement, and we all got together and pushed it off
34 and when we got into the street the tongue hit the cobble stone and broke this man's leg.

The Court: What he wants particularly to know is how it started, who ordered it to be done, how it began. Who said, 'Move the wagon?' A. The order came from Mr. Ackerman, as far as I know. He was acting pusher under Mr. Morris.

Mr. Duvall: I move that that go out, 'as far as he knows.'

The Court: You will have to confine yourself to what you heard said.

A. I got all my orders from Mr. Ackerman.

By the Court:

Q. What do you mean by 'all your orders?' A. To do what I had to do.

Q. You mean you are speaking generally, or only of that incident? A. Generally.

Q. That we do not want. Just that time. Have you any distinct recollection as to who ordered that wagon moved? A. Mr. Ackerman.

Q. Or whether anybody did. That is, do you recollect about it? A. Yes, sir. Mr. Ackerman gave us the order to move the wagon.

The Court: Go ahead.

By Mr. Whiteford:

Q. Was Mr. Morris present? A. No, sir.

Q. Did Mr. Ackerman assist in pushing the wagon, do you recall? A. No, sir.

Mr. Duvall: If the Court please, I object to the leading form of these questions.

The Court: If he was not present, he could hardly have assisted.
Mr. Whiteford: Mr. Morris was not present, but Mr. Ackerman

35 was.
 The Court: I thought you asked him if Mr. Morris assisted.

Mr. Whiteford: No, sir, Ackerman was the next one.

By Mr. Whiteford:

Q. Did you run with the wagon as fast as a horse could trot at any time? A. No, sir, it was impossible.

Q. Why? A. The wagon was too heavy.

Q. Did anybody assign Mr. Dean to take hold of the tongue of that wagon, that you remember?

Mr. Duvall: I object. These questions are very leading.

The Court: The objection is overruled.

Mr. Duvall: Your Honor will allow me an exception?

The Court: An exception may be noted.

By Mr. Whiteford:

Q. Mr. Stadelman, did you hear anyone order Mr. Dean to take hold of the tongue of the wagon? A. No, sir.

The witness further testified that he, witness, helped to move the wagon; that he was at the rear of the wagon; that he did not hear anyone yelling to the men moving the wagon to hurry up; asked if he recalled the name of the superintendent there he replied "Mr. Clauss" and that he was there when witness came to Washington.

On cross-examination witness testified that the office was on the street where the cobblestones were; it was a short block and the accident occurred about 75 or 80 feet from the office: there were a few skilled mechanics in Morris' gang, and they worked at setting the pumps, superheaters, and building the crude benzol stills, each of the gangs had one or two helpers, unskilled help called laborers; it was not necessary to have skilled mechanics with each gang; but there were skilled mechanics in Morris' gang, setting pumps and the
36 like of that, and he had helpers, all skilled mechanics have
 helpers; that was true of the pipesetters' gang; a pipesetter
 has a helper; witness remained on the job about ten days or
two weeks after Mr. Morris and Mr. Ackerman left; had been in the employ of defendant close on to two years before he came to Washington and has been in its employ ever since; was sent here by defendant to testify for them.

NICHOLAS SAARH testified that he is in the employ of defendant and was here in 1916 working for defendant; was present and helped to push an empty wagon up there at Washington Gas Light plant, 25th and H Streets; Ackerman gave the order; wagon was never pushed as fast as a horse could trot, because it was too heavy and could not be done; it was pushed slow; did not hear anyone yelling

and urging him to push the wagon faster; he was working there only two days before plaintiff was hurt and did not know him very well; he stayed there about two months.

On cross-examination witness testified that the defendant's office was on H Street, where the accident occurred and that is a very short block in there; the accident occurred about half way down that short block and in full view of the office; after the accident we drew the wagon up there and left it; left it on the street where the accident occurred; the wagon was taken down 25th street first and then turned into the street where there was a rough stony pavement, and then the accident occurred there; the name of the timekeeper on the job was Powell, but can't recall whether Powell came here from Pittsburgh with him.

37 Thereupon counsel on both sides announced the testimony closed.

And thereupon, upon all the evidence hereinbefore set out, which was all the evidence in the case, the plaintiff, by its counsel, prayed the Court to instruct the jury as follows:

1. The jury are instructed that if they find from the evidence that defendant's foreman supervised the moving of the wagon and detailed only two men, including plaintiff, to control the tongue while other servants of the defendant were ordered by him to push the wagon and that he ordered and directed the men on the tongue, including plaintiff, to turn the wagon into H Street between 25th and 26th Streets, Northwest, and ordered and directed that the wagon be moved over the rough and uneven stones forming the driveway of said H Street, as testified by some of the witnesses, and if they further find that in the circumstances two men were insufficient to control the tongue with safety to these men, including the plaintiff, while the wagon was being so moved over said driveway of H Street, and that as a consequence of same the tongue of the wagon was suddenly swerved by the condition of the driveway and caused to strike the plaintiff's left leg and injure him, then he is entitled to recover a verdict, unless you should also find that the danger in going on after he received the order to turn into H street, was so glaring that

38 no prudent person in the circumstances would have encountered it, even under orders from one having authority over him; but in connection with this latter circumstance, if you find it a circumstance in the case, you would also have to find before rendering a verdict against the plaintiff, that he had full opportunity to weigh the situation and to stop with safety, after receiving the order to turn into H street and after perceiving the danger of continuing.

(Refused and exception.)

1a. The jury are instructed as a matter of law that it is a master's duty which he owes to his servants to provide adequate employes to do his work so as to safeguard those employes engaged in such work and failure on his part so to do will amount to negligence.

(Refused and exception.)

2. The jury are instructed that if they find from the evidence that defendant's foreman Morris supervised and directed in person the work of moving this wagon and ordered the plaintiff and only one other employe to take hold of the tongue and a number of other employes to push the wagon, and that when they reached 25th and H streets, northwest, he ordered the plaintiff to turn the wagon into H street and it was moved under his direction along and over the rough and uneven stony roadway of said street, as some of the witnesses have testified, then the court instructs the jury as matter of law, that such an order to plaintiff in the circumstances carried with it an assurance to plaintiff that it was safe to do so, and if you further find that two men on the tongue of the wagon was an inadequate force to control and guide the same while the wagon was being moved over said roadway and that as a consequence the tongue became unmanageable and struck the plaintiff's leg and injured him, then plaintiff is entitled to recover in this suit.

39 (Refused and exception.)

And the Court refused to grant the prayers marked 1, 1a and 2, so offered by said counsel for said plaintiff and refused to instruct the jury in accordance therewith, to which refusal of the Court to grant each of said prayers specified, counsel for said plaintiff, then and there separately and severally excepted.

And thereupon the Court instructed the jury as follows:

Gentlemen of the jury, you have a careful piece of work to perform here, and I have a careful piece of work in stating the law applicable to the case. We do not make the law. Neither the jury nor the Court makes the law. We have to take it as it is, and the law is different in this jurisdiction from what it is in some others; different, perhaps, from what we should make it, if we were making the law, different, perhaps, from what it will be hereafter. But we cannot render verdicts or charge juries upon what we think the law ought to be.

You know, of course, that one theory of such cases is that the law ought to be that any accident like this that happens in the course of business should be treated the same as if a wagon was broken, that it should be a part of the expenses of the business, a charge upon the business; that if they break a man's leg it ought to be paid for by the employers as if it were a spoke of a wheel. But we cannot administer that law, because it is not the law. The defendant, the employer, is not an insurer of the safety of his employees, and the only ground upon which the employer can be liable is the ground of negligence; that is, that he has failed to do the duty which the law has cast upon him by virtue of the relation.

Then, again, we are limited by the declaration which the plaintiff has filed. He cannot recover except upon the ground
40 stated in his declaration. That has to pass muster before the Court. It may be demurred to, and the Court will decide whether it states sufficient cause of action. If it does not, it is thrown out. If it does, then the question is whether the plaintiff can prove it, and prove just what he has stated in the declaration.

There were three grounds of complaint in the declaration. One

was, first, that the plaintiff had been set to do some work that he was not employed to do, and I have held that the evidence does not support that claim, in view of what the plaintiff himself says. Therefore, you could not find, or would not have any right to find, upon the state of the evidence in this case, that in asking him to help move this wagon around there he was set to do some work that he had no reason to expect that he would be required to do when he hired out, that it was a different class of work from that which he was hiring out to do.

The second ground is that he was put in an unsafe position to work by the order of his employer, in this, that two men only were set to hold the tongue and guide the wagon, whereas more men ought to have been placed there.

Third, that he was not given any warning by those who were directing the work as to the danger he was in, by reason of his position.

In the first place, a man who undertakes to labor for another in such work as this plaintiff was undertaking to labor in assumes certain risks himself. That is what he is paid for. He assumes all the natural and obvious risks of his employment. If he gets hurt by reason of those risks, he is paid for that in his salary or his wages, and he cannot recover from his employer for those, and among those risks are the carelessness and negligence of the men he is working alongside of. The employer is not responsible for accidents and injuries that happen to one employee by reason of the carelessness of that man's fellow employees who are working in the same kind of work that he is. If he knows that he is employing
41 unfit men to work with an other, that is another ground. But we have not anything to do with that here.

But if the employer himself directs where a man shall work, and puts him — a place of danger, there may be liability. This was a corporation, as I understand it, it could only act through agents, of course, and if the man who put the plaintiff where he was at work—if anybody put him there, I mean put him at the end of this tongue—stood in the place of the employer itself represented the employer having general charge and control over the work, then the fellow servant rule does not apply. There is evidence tending to show that he was put there by Morris, and that Morris did have general charge of the work, and I am submitting the case to you on the theory that you may find that to be true. If you do not find it to be true, that is, if you do not find the balance of the evidence in favor of that proposition, when you look the whole case over, then the plaintiff has not any case, because if it was Ackerman, who was a mere fellow-servant, a pusher, if he was the one who gave the directions and put the plaintiff there, then the company is not responsible, because it was simply the negligence, if it was negligence, of a fellow-servant. So that you should take up that question and decide where the balance of evidence is. Was it Morris? Was he the one who put the plaintiff there and gave the directions, and went around with the said wagon, and shouted and urged them on, if anybody did? Was

it Morris himself? That is peculiarly a question for you. You heard Morris testify, you heard the other witnesses for the defendant testify, you watched them, and judged them, and you heard the evidence on the other side, of the plaintiff and Biggs. Which is right? On the whole, when you look the evidence all over, are you more inclined to believe, from the testimony, that it was Morris than that it was not? If so, then you find that point in favor of the plaintiff, but if you do not find the balance of evidence in favor of the plaintiff

42 on that subject, then you will bring in a verdict for the defendant.

But if you find that Morris did have this general authority, and that he ordered the plaintiff to take that position, and determined that there would be only two men there, then you come to the question, was that a piece of carelessness on his part? Was that careless for him, in having this wagon around there, to put only those two men there at that point, with the other men to do the pushing? You will notice that this declaration does not charge negligence by reason of the speed at which the wagon was run around there. So that you cannot find for the plaintiff on the theory that they ran around there too fast, that Morris was hurrying them up and urging them on at an unreasonable rate of speed, because if the plaintiff had wished to make that case, he should have charged it in his declaration. He does not.

But he has charged that the immediate, proximate, direct cause of this accident was the fact that he was put in a place of danger by reason of there only being two men there at the end of that tongue. Are you with him on that proposition? Do you think that is true? On the whole, when you look all the evidence over, taking your own experience and the experience of men in general as to such matters in the handling of a wagon of that weight, and under those circumstances, do you say it was not the act of a man of ordinary care and prudence to undertake to have the wagon moved in that way, that is, with only two men there on the tongue? Was that negligence? If so, that point is in favor of the plaintiff. If you do not find a balance of the evidence in favor of the plaintiff on that subject, then the defendant has prevailed, so far as that point is concerned.

If it was a careless thing to do on the part of the defendant, through Morris, his agent, then was the plaintiff also careless? And did his carelessness directly contribute to his injury? If so,

43 he cannot recover, and you should take the same test to apply to him. He was bound to exercise reasonable care for his own safety, and if he failed to do so, and his failure to do so directly contributed to the accident and to his injury, he cannot recover.

There is another principle that comes in there, which is for you to consider and see whether it applies to the case. He was bound to and did assume all the ordinary, natural, obvious risks of his employment, and when he was asked or told to take that position, he was chargeable with knowing what a reasonable man in those circumstances, and with such experience as he had had, would know

and understand was the risk of the position, and that he assumed, because he did not have to do it. He could have said, "I will not do it. It is a dangerous place and I will not do it." Was the risk one that was obvious to him, or ought to have been—one that he appreciated, or that, as a reasonable man, he ought to have appreciated? If so, then he assumed it. But if not, assuming that a wagon could be moved around with no particular danger, he not appreciating the danger, as a reasonable man, if you say he was not excusable for not appreciating it, but the danger was one that occurred afterwards, suddenly occurred, then a different question might be presented, and he might be excusable for not appreciating the risk and danger. If you find that it was a risk he did not assume, that it was not obvious, and was not appreciated by him, and that he had no reason to appreciate it, until it was too late for him to get out of his predicament, then you would have a right to resolve that question in favor of the plaintiff.

What was the situation? When did the danger first arise? And when it did arise, was he in such a position, and was the situation and progress of the wagon such that he had any election or choice about it? Could he have gotten out, or did he have to hang on and go on in the position where he was?

44 You understand, of course, that the claim of the plaintiff is that the latter is the true situation with respect to it, that when the danger did arise, it was too late for him to save himself. But that is a question of fact for you, keeping in mind that he was bound to exercise reasonable care for himself, under the contributory negligence rule, and also that he assumed the obvious risks of his employment, so far as it was reasonable for him to abandon the work at a given stage when he appreciated the danger.

If you find all these points in favor of the plaintiff, weighing the evidence, and finding that the evidence is rather in favor of the plaintiff than of the defendant upon these various points, and find that the failure to put a sufficient number of men there was the direct, immediate, what we call at law, the proximate cause of the accident and injury to him, then the plaintiff has made out his case.

If something else was the direct and proximate cause, if you say, "Well, that was not the immediate cause of this accident. The immediate cause was the speed at which they were going around there, and the way in which the thing was being hurried up, and that there were men enough there to have held the tongue, if they had not gone at such an unreasonable rate of speed", then the plaintiff cannot recover, because that is not what he claims in his declaration. He cannot recover unless the proximate cause of this accident and injury to him was the failure to furnish a sufficient number of men there on the tongue. If you find for the plaintiff, then he is entitled to recover fair compensation for his injuries.

If the jury find for the plaintiff they are to consider, in estimating the damages, the injuries to the plaintiff and the damages resulting therefrom. They are to consider his health and condition before the injuries complained of, as compared with his present condition in

consequence of such injuries. They are to take into consid-
45 eration the sufferings including bodily pain, in consequence
of such injuries, and also the mental pain and suffering, past
and future, attendant upon and the natural incident of such bodily
suffering, the character and extent of his physical disabilities and
whether the injury is permanent or otherwise, and how far, if at all,
it is calculated to disable him from engaging in those employments
for which, in the absence of such injury, he would have been quali-
fied, and they should award such damages within the limits of the
sum claimed in the declaration as will fairly and reasonably compen-
sate the plaintiff for the injuries which he has sustained.

Now, gentlemen, you will not, of course, render any verdict by
reason of sympathy. No man can see another person who has been
injured without sympathizing with him. But that does not give us
the right to take other people's property or money to pay. We can
pay what we wish to ourselves, if he is willing to take it, but we can-
not take another man's money to pay him unless the law makes the
other liable. And whether it does, within the rules I have stated to
you, depends on the facts, as you find them to be the case. I know
you will deal with the case conscientiously, and render such a verdict
as you feel that the evidence requires.

Thereupon counsel for the said plaintiff, after the deliverance of
the oral charge of the Court to the jury, renewed each and all of his
exceptions to the refusal of the Court to grant each of the prayers
heretofore specified offered by and on behalf of the said plaintiff,
which exceptions were then and there noted upon the minutes of the
Court.

Thereupon counsel for the said plaintiff also interposed an
46 objection to the oral charge of the Court as follows:

"Mr. Duvall: I desire to note an exception to that part of
your Honor's charge which directed the jury that they could not con-
sider that allegation of the declaration with regard to the plaintiff's
being required to do some work outside of the scope of his employ-
ment. I would like also to note an exception to your Honor's re-
fusal to permit me to argue that point to the jury.

"The Court: Surely."

But the Court adhered to his refusal to allow counsel for plaintiff
to argue the said question of fact to the jury and also adhered to his
instructions to the jury and refused to withdraw, alter or modify the
same, to which action of the Court the said plaintiff, by its counsel,
then and there duly excepted and said exceptions were noted at the
time upon the minutes of the Court. And thereupon and thereafter
the jury retired to consider its verdict.

Be it remembered that each of the separate and several exceptions
taken by counsel for plaintiff, as hereinbefore set forth in this bill
of exceptions were so taken by the said counsel then and there, before
the jury retired, separately and severally, duly noted upon the min-
utes of the justice presiding at the trial, and at the request of counsel
for the plaintiff this bill of exceptions, which contains all of the evi-
dence given at the trial and all of the proceedings had therein, is

signed and sealed and made a part of the record in this cause, now for then, this 17th day of April, 1919.

WENDELL P. STAFFORD,
Justice.

Settled by consent, this 17th day of April, 1919.

EDWARD S. DUVALL,
Attorney for Plaintiff.
ROGER J. WHITEFORD,
WM. H. DONOVAN,
Attorneys for Defendant.

47 [Endorsed:] At Law No. 59,371. Harry Dean, Plaintiff,
vs. H. Koppers Company, a corporation, Defendant. Bill of
Exceptions. E. S. Duvall, Law Offices of Evans Building, Wash-
ington, D. C.

Endorsed on cover: District of Columbia Supreme Court. No.
3279. Harry Dean, appellant, vs. H. Koppers Company, a corpora-
tion. Court of Appeals District of Columbia. Filed May 20, 1919.
Henry W. Hodges, clerk.

~~DEPT. OF JUSTICE~~
DISTRICT OF COLUMBIA
FILED

SEP 24 1919

IN THE

Harry D. Dean
Thorn

Court of Appeals, District of Columbia

OCTOBER TERM, 1919.

—
No. 3279.
—

HARRY DEAN, *Appellant,*

vs.

H. KOPPERS COMPANY, A CORPORATION.

—
BRIEF IN BEHALF OF APPELLANT.
—

EDWARD S. DUVALL,
Attorney for Appellant.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1919.

No. 3279.

HARRY DEAN, *Appellant*,
vs.
H. KOPPERS COMPANY, A CORPORATION.

BRIEF IN BEHALF OF APPELLANT.

This is an appeal from a judgment rendered on a verdict returned by a jury in favor of the defendant below (appellee).

I.

STATEMENT OF THE CASE.

This is an action in tort. The declaration, which is in one count (R., 1, 2 and 3), claims damages for personal injuries to the appellant, and suit is brought by Dean against the H. Koppers Company. It charges in substance that the defendant, a corporation, was engaged in the business of

constructing, repairing and building of apparatus and appliances for the manufacture of gas, and that it employed in its said business workmen to do the construction, installation and repair work, and certain other workmen, unskilled labor, to help on said work; that on June 14, 1916, the defendant was engaged in installing gas appliances and apparatus for the Washington Gas Light Company at one of the latter's plants, at 25th and H Streets, N. W., in this city, and on said date plaintiff worked there in the employ of defendant; that he was employed as a laborer "on work of the defendant as aforesaid" but on said date he was required by defendant to stop his said work and to assist in the moving of a certain large and heavy wagon which was standing adjacent to defendant's place of operations, which work plaintiff was not engaged to do and was not accustomed to do; that plaintiff and one other were detailed to the pole of the wagon (the horses had been taken away) while others were ordered to push the body of the wagon; that it was the duty of the defendant (a) to detail a sufficient number of its employees to assist the plaintiff or (b) to notify and warn the plaintiff of any possible danger to him which might result from obeying the order; that the defendant failed to perform its said duty in both particulars and, while the wagon was being moved along a certain public street, its wheels were driven against an obstruction in the roadway, without any warning to plaintiff, and that, because of insufficient help at the pole or tongue, to hold and guide it, it suddenly swerved against plaintiff's legs, breaking and permanently laming his left leg and injuring his elbow.

And the foregoing is the substance of the declaration.

Plea not guilty and verdict for defendant.

According to the evidence, certain facts were proved, namely:

(a) that the defendant's business, in which it was engaged when the plaintiff was employed and when he was injured, was the installation of gas apparatus and appliances (R., 8, 10, 11, 12, 13, 14, 16 and 17) which came from Pittsburgh and other parts of the country (R., 17).

(b) defendant did no concrete or brick work, this was sublet (R., 16).

(c) the gas tanks for this job had to be assembled after they were delivered and defendant employed an erecting engineer to supervise the work (R., 16). He was sent here from Pittsburgh by defendant as was also one P. J. Morris, a foreman, who had charge of the construction department (R., 20) and hiring of the labor (R., 17).

(d) only mechanics and mechanics' helpers were used on this job, divided into gangs, such as pipefitter's gangs, riveter's gang, etc., each under a foreman and their work consisted in assembling and installing gas tanks, etc. (R., 8, 10, 11, 12, 13, 14, 15, 16, and 17).

(e) the defendant employed no wagons or teams in its work (R., 8, 11, 13), Littlefield & Alvord did the hauling under a contract with defendant (R., 13, 17 and 18).

Plaintiff testified as to his employment that he was employed as a mechanic's helper (R., 10) and put by P. J. Morris, who employed him, in a gang of about seven men, at which time the defendant was putting up big iron tanks and he was first put to work erecting the tanks (R., 8); that when he applied for work, Morris told him that he would be put in charge of another gang and he said he would just have to help around the tanks and the machinery that was going up and do what the foreman told them to do (R., 8); that he was to receive 30 cents an hour; that from that date until the accident happened he worked for Morris, as a mechanic's helper, "doing most anything he told us" (R., 8); that on the day of the accident was the only occa-

sion, the first time, that Morris had ever ordered him to move a wagon (R., 8); that his work consisted in carrying lumber, unloading wagons, helping to block up tanks, using pulleys and derricks and taking tanks off wagons (R., 10); never had any previous experience in handling a wagon tongue, as in this case, and when ordered to take hold of the tongue with another workman, he did not know of the danger or he would not have complied (R., 11).

Biggs, a witness for plaintiff, testified that he was employed as a pipefitter's helper (R., 12), and worked in that gang about two weeks, running pipes around the yard, carrying pipes from the vise to the job, and generally doing any laboring work necessary to be done in connection with the work the pipefitters were doing, anything a pipefitter's helper would do; they were supposed to carry boards or lumber, or anything; that there were three or four different gangs each under its foreman; that Morris was handling a gang which was erecting the tanks; witness was transferred by a foreman to the gang which was erecting tanks; in this gang the work he did was raising tanks, putting tanks up on the ceiling, and tightening the bolts and nuts on the stills, they were supposed to do anything around there and Dean was doing the same kind of work he was; this witness was also ordered by Morris to help move the wagon in question and Morris was there, with his hands on the wagon assisting (R., 14); that defendant never had any teams of its own in its business there and the hauling on this job was done by Littlefield & Alvord (R., 13).

Evidence was also adduced tending to prove that P. J. Morris had general charge of the actual work of assembling and erecting the gas tanks and other apparatus and appliances, under supervision of Claus, the engineer in charge (R., 11, 12, 13, 15, 16 and 17), and never worked alongside the men, just gave orders (R., 15); that Morris hired the labor (R., 17) and had direction of the work in general

(R., 12, 15, 21). Claus' testimony for the defendant, confirmed this in part (R., 16, 17).

Morris testified that his work was putting in tanks and setting pumps, machinery and line shafting; that he had about 17 men in his squad; that he went about the job to see that the work was being properly done (R., 18); he denied that he gave the order to move the wagon; denied that he knew it was being moved and said he intended that it should remain just where Littlefield & Alvord left it, after it was unloaded (R., 18 and 19); he unloaded the wagon with a squad of men (R., 18).

Stadelman, a witness for defendant, testified (R., 22) that there were a few skilled mechanics in Morris' gang and they worked at setting the pumps, superheaters and building the benzol stills; each of the gangs had helpers, unskilled help called laborers; Morris' gang had helpers; all skilled mechanics have helpers. The defendant introduced no evidence to prove that it was a part of the work, of the helpers in any of the gangs to move wagons.

Upon this state of the evidence, the Court, in its general charge, of its own motion, ruled that moving the wagon of Littlefield & Alvord was within the scope of Dean's employment, and instructed the jury that there was no evidence to support the allegation in plaintiff's declaration, that he was ordered to do work outside the scope of his employment and therefore the jury would not have the right to find that as a fact (R., 25).

II.

ASSIGNMENTS OF ERROR.

The trial court erred:

1. In refusing to permit plaintiff to give evidence that there were skilled mechanics in his gang and the kind of work they were doing.

2. In refusing to instruct the jury as requested in plaintiff's prayer No. 1.

3. In refusing to instruct the jury as requested in plaintiff's prayer No. 1a.

4. In refusing to instruct the jury as requested in plaintiff's prayer No. 2.

5. In refusing to allow plaintiff's counsel to argue to the jury that plaintiff was employed to do one kind of work and was injured while obeying the foreman's order to do work not contemplated in his contract of hiring, as bearing on the question of assumed risk.

6. In instructing the jury that there could be no recovery under the first ground of negligence alleged in the declaration, namely, that plaintiff was hurt while doing some work which he was not engaged to do and defendant did not warn him of the risks thereof; but that the moving of the heavy wagon was work contemplated in his contract of hiring and he assumed all of the natural and obvious risks incidental thereto.

III.

ARGUMENT.

The six assignments of error involve two general propositions. The first, second, fourth, fifth and sixth specifications of error are predicated upon the rulings of the court below that the moving of Littlefield & Alvord's wagon was within the scope of Dean's employment.

In the proposition presented by these five specifications, is involved the question, important to plaintiff's case, whether the risk was one assumed by Dean when he accepted the employment. The first specification will not be pressed because the desired testimony was elicited from other witnesses, subsequent to the ruling excepted to (R., 14, 22). The other four assignments may be considered together.

The third assignment of error involves a general proposition of law, which was considered applicable in this case, under the theory of plaintiff's right to recover. It was conceded to be the law, that a master owes his servants the duty to supply a sufficient number of competent fellow-servants to do a particular work, otherwise it may amount to negligence for which the master would be liable, and it is thought that this requested instruction correctly stated that principle. This assignment, however, will not be pressed, because it is believed now upon mature reflection, that the court in its general charge sufficiently stated the principle in question.

1. It was error on the part of the trial court to decide that the contract of hiring covered the work in question, and that plaintiff had not made out his claim, as alleged in the declaration, namely, that he was injured while doing a piece of work, under positive orders of the foreman, which was not within the scope of his contract of employment, and the danger thereof was not an assumed risk.

The doctrine of assumed risk grows out of contract while the doctrine of contributory negligence grows out of tort.

St. Louis Cordage Co. v. Miller, 61 C. C. A., 477;
126 Fed., 495.

Narramore v. Cleveland, etc., R. R. Co., 37 C. C. A.,
499; 96 Fed., 298.

If the plaintiff, when he accepted employment from the defendant, agreed to do this thing in the doing of which he was injured, that is, if it was within the contemplation of both, then it may be rightly said that he, by the contract itself, assumed all of the natural and obvious risks incident to his employment including the risks of this particular work. If, on the other hand, it was not within the contemplation of

these parties when the plaintiff was put to work, that he would ever be required to assist in holding the tongue of a two-ton truck while it was being manually hauled from point to point, then it was not in their contract, by implication or otherwise; the plaintiff's wages can not be said to have been fixed with that risk in view; and it follows from what has been said, that he did not assume such risk.

Dallemand v. Saalfeldt, 48 L. R. A., 757, and notes to same.

It was not contended by the defendant, at the trial, that the plaintiff was given warning as to the danger involved in the position at the tongue of the truck, which he was ordered by the foreman to take, and therefore the question is not in the case, whether he assumed the risk by obeying, after being warned of the danger. No such evidence was introduced at the trial.

The defenses were assumption of risk; contributory negligence; and that no one having authority, ordered Littlefield & Alvord's wagon to be moved.

The evidence adduced by plaintiff tended to prove that he was employed as a helper to mechanics engaged in erecting gas apparatus and appliances in a building and that defendant did not employ any teams in this work when plaintiff was first employed or at any other time thereafter while plaintiff worked there. Defendant had no occasion to use teams. The hauling was all outside hauling and was done by an independent contractor, Littlefield & Alvord, and defendant had let the cement and brick work to another independent contractor. The mechanics employed were workers in special lines, none of which called for wagons in and about the job, and the laborers or unskilled workmen, commonly called mechanics' helpers, but classed as laborers and paid as such, helped these mechanics to do their work; each

particular gang, the riveters, pipe-fitters, tank-erectors, etc., having its quota of helpers (R., 22). It is a matter of common knowledge that in all trades, and in the various branches of each trade, a mechanic requires his helper to assist him. The helper is generally an unskilled workman, and paid as such, but his work is defined by the character of the work which his mechanic does.

Aside from what Morris told the plaintiff his work would be when he engaged him, what were the surrounding circumstances? What work was observable by the plaintiff? Certainly no such work as moving wagons. The nature of the work did not call for wagons, and defendant used none. It is improbable that the moving of a wagon for an independent contractor, over a cobblestone street, was within their contemplation. Nowhere in the evidence introduced by the defendant, was the claim advanced that such was a fact or that at any time they had wagons to be moved.

All of the foregoing facts and inferences are reasonably deducible from the evidence in the case relating to the parol agreement of hiring and the attending circumstances, some of which evidence has been referred to in the Statement of the Case.

Consequently it was error for the trial court to rule that the contract did include the moving of wagons. Under the evidence in the case, plaintiff's counsel had the right to submit argument to the jury that this work was not within the scope of Dean's employment; that he did not assume the risk; and, there having been no warning, he was entitled to recover, unless the danger was an obvious one. This he was not allowed to do, and an exception noted, when, for the first time, the ruling was announced in the oral charge of the court (R., 28).

If the jury had not been instructed as it was on this question, the doctrine of assumed risk would not have ap-

plied. If the jury had found under proper instructions that the danger was so obvious and imminent that a prudent person would not have encountered it, even under orders from one having authority over him, then the question whether he was guilty of contributory negligence in the circumstances would have been presented to the jury for its determination. The instructions, Nos. 1 and 2, requested by plaintiff, correctly stated the law and were applicable to the evidence, under plaintiff's theory. They should have been given and it was error for the trial court to refuse them.

R. R. Co. vs. Morris, 93 Pac., 153; 13 L. R. A. (N. S.), 1100.

Allen vs. Gilman, McNeil & Co., 127 Fed., 609.

Millboro Lumber Co. vs. Donald, 90 S. E. (Va.), 618.

Hull vs. Davenport, 159 Pac. (Wash.), 1072.

Tubbs vs. Stone & Webster Cons. Co., 159 Pac., 242.

5 Thompson on Negligence, Secs. 5379, 5381 and 5382.

Chicago Anderson Pressed Brick Co. v. Solkowiak, 148 Ill., 573.

While plaintiff assumed all ordinary and usual risks of the service in which he engaged, he did not assume unknown perils, arising from any omission of reasonable care in the performance of the master's duty of control of the work in hand. That duty was devolved on Morris, and required him to use common prudence so to direct the movements of those subject to his orders as not to expose them to any greater danger than was usually incident to the employment. Schroeder v. Chicago & A. R. Co., 108 Mo., 322; 18 L. R. A., 827.

It can not be said in reason that the court's errors in the foregoing respects were not highly prejudicial. Under the erroneous determination of the contract and its scope, made by the court, and under its instructions as to assumed risk,

predicated thereon, which were given in the general charge, it was left to the jury to find, as matter of fact, whether the danger encountered by plaintiff was one of the natural and obvious risks of his employment, whereas that question must have been decided by the court as matter of law, in favor of plaintiff's contention, as a corollary of the principal question had that been correctly decided by the court. The jury was instructed that if they found that it was one of the risks of that particular act (moving a wagon) then the plaintiff could not recover because it would be one of the risks which he assumed under his contract.

"It is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party." *V. & M. R. R. Co. v. O'Brien*, 119 U. S., 99.

The trial court's decision concerning the contract was based, as shown in the oral charge (R., 25), solely on one isolated answer of the plaintiff occurring in cross-examination (R., 10), without consideration of any other testimony on the subject, of which there was ample to sufficiently give a different meaning to the language of the plaintiff, than that adopted by the court. The cross-examination referred to was as follows:

"Q. When you went there and were put to work, what kind of work did you do? A. I was hired as mechanic's helper—

Q. I am not concerned with what you were hired for. What did you do? A. Anything whatever I was told to do—carried lumber—

Q. What else? A. Unloaded wagons.

Q. Anything else? A. Helped block up tanks."

When the court said to the jury, in its charge, "I have held that the evidence does not support that claim, in view of what the plaintiff himself says," it had reference to the isolated answer to the second question, above, to the effect that he did anything that he was told to do. It is submitted that if it was properly the province of the court to pass on the evidence and determine what the contract of hiring was, it should have taken all of the evidence for that purpose. It was violative of all accepted principles and rules, governing the determination of a contract either by court or jury, to disassociate one bit of testimony from all of the other facts and circumstances in a case, and to put a strained, unnatural and unfavorable construction upon the language where it is susceptible of another, favorable and reasonable interpretation or meaning to be gleaned from the other facts and circumstances. In the light of the whole evidence bearing on the scope of this contract, it must be clear that what the witness meant by that answer was that he did anything he was told to do *in the line of the work of his gang*. What the work of that gang was is clearly shown by the testimony of plaintiff and his witness Biggs, and that of Morris the foreman in charge of construction, and Stadelman, both of the latter witnesses for defendant. As stated by Stadelman, Morris' gang "worked at setting the pumps, superheaters, and building the crude benzol stills" (R., 22), while Biggs testified that Dean did the same kind of work he did and that was "raising tanks, putting tanks up to the ceiling * * * and we had to tighten these bolts and nuts on the stills" (R., 14).

Was it reasonable, therefore, in view of the other evidence, to surmise that it was in the line of plaintiff's work to move wagons for independent contractors? That it was not may be easily ascertained by inquiring whether it was defendant's work to move one of Littlefield & Alvord's

wagons? According to the testimony of defendant's witnesses, Clauss and Morris, it was not (R., 18, 19, 20). If it was no part of defendant's business to move a Littlefield & Alvord two-ton truck how can it be said in reason that it was a part of the work of one of defendant's servants?

If it be said that Dean's answer, referred to, constituted a contradictory statement, then this would have required the court to submit all of the evidence to the jury to determine what to accept. *Davis vs. Holton*, 59 Kans., 707.

If this court, upon consideration of all of the evidence touching the contract, should be of the opinion that there were inferences of fact to be drawn therefrom in order to correctly determine what the contract of hiring was, then it became a question for the jury and not for the court.

Etting vs. Bank, 11 Wheat., 76.

Roberts vs. Bonaparte, 10 L. R. A., 689, 73 Md., 191.

For the errors pointed out, it is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

EDWARD S. DUVALL,
Attorney for Appellant.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1919.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 15 1919

No. 3279.

Henry L. Rodgers
Union

HARRY DEAN, APPELLANT,

vs.

H. KOPPERS COMPANY, A CORPORATION.

BRIEF IN BEHALF OF APPELLEE.

FRANK J. HOGAN,
ROGER J. WHITEFORD,
WM. H. DONOVAN,
Attorneys for Defendant.

Washington, D. C., October 11, 1919.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1919.

No. 3279.

HARRY DEAN, APPELLANT,
vs.
H. KOPPERS COMPANY, A CORPORATION.

BRIEF IN BEHALF OF APPELLEE.

STATEMENT.

In this case the appellant and appellee were respectively plaintiff and defendant in the Court below, and will be hereinafter so referred to.

Plaintiff, a laborer in the employ of defendant, was injured while engaged with other employees in moving an empty wagon which had just been unloaded by them. The wagon had contained a tank to be installed by defendant. The horses had been taken from it, and the wagon left backed up across the sidewalk to the doorway of the building in and about which the men were working, to be unloaded by them.

Two declarations were filed in the case. The first was held bad in substance by the lower Court. The amended declaration, upon which the case was tried, charged defendant with liability on the ground that insufficient help had been supplied plaintiff to assist him in guiding and pulling the tongue of the wagon, which he, with other employees working in the same gang with him, had been directed to move. The facts are further dwelt upon with sufficient detail in the argument which follows:

The case was submitted to a jury who returned a verdict for defendant.

ARGUMENT.

I.

There are six assignments of error (R., p. 5). Of these plaintiff apparently concedes there is no merit in two, namely, the first and third, as he says in his brief (pp. 6, 7) they will not be pressed. It is therefore not necessary to discuss them here, further than to say as to the third that it was predicated on the refusal by the Court of plaintiff's instruction No. 1a, on the subject of the duty of the master to provide an adequate number of employees on the job. Plaintiff says he finds on mature reflection that the principle was sufficiently stated by the Court in his charge to the jury. We think that with a little more reflection he would have found himself able to say the same thing with reference to assignments 2 and 4, which also have to deal with the refusal by the Court of plaintiff's instructions Nos. 1 and 2 on the subject of the adequacy of the number of men assigned to the particular task in hand at the time of plaintiff's injury. A reference to these two proposed instructions (R., pp. 23, 24) will show at once that in the form in which they were prepared they could not properly have been given to the jury, and an examination of the charge of

the Court to the jury (R., pp. 25-27) will show that everything they attempted to cover was fully, clearly and accurately covered by the Court in a particularly painstaking manner. It might be said in passing that although the question of the sufficiency of the number of men was submitted to the jury, it must have been on the evidence largely a matter of speculation and guesswork for them. No qualified witness testified as to the sufficiency or insufficiency of the number of men. No one testified that there was one word of complaint or protest on the part of any of the men; plaintiff himself says he made no protest (R., p 10). On the other hand, it appears that the men undertook the task willingly and as a matter of course. There was some conflicting evidence in plaintiff's case as to the size of the wagon, and as to the number of men engaged in moving it, as well as to how there came to be two men at the tongue, plaintiff testifying that Morris, his foreman, put him there with a man named Warner (Warner not testifying) (R., p. 8), and Biggs, the only other witness for plaintiff testifying on the subject, saying twice on direct examination that "Morris did not place us in any position at all, just told us to grab hold of the wagon and take the wagon around." * * * "He said to grab hold of the wagon, take the wagon around H Street. So naturally, we grabbed hold of the wagon. He didn't place us in no position at all. Mr. Dean and Mr. Warner, they got hold of the tongue of the wagon." (R., p. 13). And again, on cross-examination, he testified:

"Q. You said that Mr. Morris said to take the wagon down on H Street?

A. Yes, sir; to take the wagon down on H Street.

Q. He did not tell anybody where to go on that wagon at all, or what to do?

A. No, sir; he didn't place us at all.

Q. Just said, 'Boys, take the wagon out'——

A. 'Boys, take the wagon on H Street.'

Q. He did not tell you where to get on the wagon?

A. No, sir.

Q. He did not tell Mr. Dean where to get on the wagon?

A. No, sir." (R., p. 15.)

The evidence on the part of the defendant corroborated plaintiff's witness Biggs on this point. Further, Morris testified that he gave no orders to move the wagon and had nothing whatever to do with it (R., p. 18). Ackerman, concededly a fellow employee, testified that *he* suggested the moving of the wagon, and that he did not tell plaintiff where to get hold of it; that "several of the boys got behind it, and some of them got hold of the tongue and moved it" (R., p. 20). He was corroborated by Stadelman (R., pp. 21, 22), and Saarh (R., p. 22). Ackerman further testified, speaking of the wagon, that "he did not order any particular number of men to move it"; asked how many men he did take for it, he answered he did not take any, he just said to the boys 'Get the wagon off of here as soon as you can.' Asked where he found the boys, witness said they were all working, helping unload the wagon and they were right there at the door" (R., p. 20). This was corroborated by Stadelman (R., p. 21). Reference to the declaration will show that the only negligence plaintiff alleges is that the accident occurred "because of insufficient help to assist him in so guiding and pulling the tongue" of the wagon (R., p. 3).

Of course, the mere fact of the happening of the accident is not sufficient to show that the defendant was negligent. In 18 Ruling Case Law, at page 602, it is said:

"The single fact of the happening of an accident which would have been avoided had more employees

been provided to perform the work safely is not of itself sufficient to establish negligence of the employer. It must also appear that he did not exercise ordinary or reasonable care and prudence in estimating the number actually provided as necessary for the particular work."

The plaintiff, in his instructions 1 and 2 which were refused by the Court, and correctly so, were, as worded, necessarily based on the assumption that the master is an insurer of the sufficiency of the number of men assigned, to say nothing of the fact that they assumed that Morris was a vice-principal.

II.

The remaining assignments, as stated by the plaintiff, involve the question of whether the plaintiff assumed the risks incident to the performance of the particular piece of work in which he was engaged at the time of the accident. Plaintiff contends that assisting in the moving of the empty wagon was not a task which came within the scope of his employment, and that the lower Court erred in holding that, in view of plaintiff's own testimony, this contention was not supported by the evidence.

The record clearly establishes the character of plaintiff's employment. He was an unskilled laborer performing any task to which he was assigned around and about the work, like any other unskilled laborer on the job. In his declaration plaintiff says that it was the business of the defendant, among other things, to construct, repair and build tanks and other equipment connected with the manufacture of gas, and to that end employed workmen in *and about* such work, and that the plaintiff was "in the employment of said defendant as *a laborer*, and as such *laborer* was employed on the work of the defendant as aforesaid" (R., p. 2). The evidence showed that the job involved work both inside and

outside of the buildings. Upon taking the stand, plaintiff testified in his own behalf that he heard defendant was taking on hands, and that he visited the place, saw a man named Morris, asked to be put to work, without specifying the character of work, was told his wages would be 30 cents an hour, and with a number of other men hired at the same time was assigned, not to help a particular mechanic, but to a gang. Asked on direct examination if he was told by Mr. Morris what work he was to do when he was first employed, he answered, "He said we were just to help around the tanks and machinery that was going up *and to do what the foreman told us to do,*" and further testifying he said that from the morning of June 6th on which he was hired until the accident he worked in Morris' gang, working as a mechanic's helper, "*doing most anything he (Morris) told us,*" and further, there were about 8 or 9 in the gang, "mechanics' helpers and laborers." (R., p. 8.) On cross-examination he testified that prior to securing a job with the defendant he worked at various things, including loading ice on ice wagons, delivering ice to houses, at \$2.25 per day, driving horses, conductor on a street car, and worked in a tube works at \$1.75 per day (R., p. 9). Again, in answer to a question as to the kind of work he did for defendant, he replied, "Anything whatever I was told to do—carried lumber,"—"unloaded wagons,"—"helped block up tanks" with pulley and a derrick, and that he with the rest of the gang had unloaded a heavy tank from the wagon by which he was injured shortly thereafter (R., p. 10).

Andrew J. Biggs, the only other witness for the plaintiff whose testimony had any bearing on the character of work in which plaintiff was engaged, testified that, like plaintiff, he was a member of a gang, at 30 cents an hour; that there were three or four gangs; that at first he worked in the pipe-fitters' gang, carrying pipes around the yard, carrying pipes

from the vise to the job, generally any laboring work that was necessary to be done in connection with the work the pipefitters were doing, anything a pipefitter's helper would do; "we were supposed to carry boards or lumber or anything"; that later he was transferred to the gang to which plaintiff belonged and that "we were supposed to do anything around there, and Mr. Dean (plaintiff) was doing the same kind of work he was." (R., p. 14.)

The above was all the testimony in the case touching the character of plaintiff's employment, except insofar as it was corroborated by evidence on the part of the defendant that the men unloaded wagons, and so forth.

It is submitted that it is perfectly clear from the plaintiff's own testimony, by which he is bound, and the other testimony in the case as above, that the plaintiff was a laborer employed to do anything he was told to do in and about the work, and that from the time of his employment to the time of the accident he did just that.

III.

The next question is as to whether the moving of the empty wagon was an incident of the work. The evidence shows that materials for the work were brought to the place of operations in wagons, and that these materials were unloaded from the wagons by the men in the gangs. Plaintiff testified that his duties, among other things, included the unloading of wagons (R., p. 10), and that he helped to unload the wagon in question (R., p. 8), as did also Biggs, witness for plaintiff (R., p. 14). Morris testified that the men were either setting machinery or unloading wagons the afternoon of the accident (R., p. 19). So that, it is evident that wagons were coming there and that it was the duty of the men, including plaintiff, to unload them. The particular wagon in question had been brought to the

building loaded with a tank. As it was in the early evening, and the wagon was to be unloaded by defendant's employees, the driver removed his horses therefrom and took them to the stable, leaving the loaded wagon backed up across the pavement and against the building (R., pp. 10, 14, 19, 21). It could not, of course, be permitted to remain there over night, and the men who had just unloaded it, including plaintiff, removed it to a point where it would be out of the way of the work and of traffic. Whether Morris directed the men to move it, as plaintiff and Biggs say, or whether Morris did not so direct, but the men themselves, realizing that the wagon could not be left there, at the suggestion of Ackerman, one of their number, voluntarily took it out of the way, as testified to by Ackerman, Stadelman, and Saarh (R., pp. 20, 21, 22), is unimportant to the determination of the point here, namely, whether the removal of the wagon was within the scope of plaintiff's employment. The fact is that the wagon had been left across the pavement where it had been backed for the convenience of defendant's employees in unloading, and it had to be removed in the same manner as any other temporary obstruction in the way of material, or of appliances used in the removal of material from wagons, would have to be removed, and the men who unloaded the wagon removed it as a matter of course. It was simply one of those many incidental things which arise in connection with this character of work, and it is submitted that even if the foreman ordered the moving of the wagon, which was denied by four witnesses and was fairly left to the jury to decide, it was a reasonable order to perform a task which was clearly within the scope of the employment of the men whose services, as plaintiff and plaintiff's witness Biggs said, consisted in doing anything they were told to do by the foreman.

IV.

Plaintiff complains that by what he says was the erroneous ruling of the Court on the subject of the scope of his employment, his counsel was deprived of the opportunity of arguing to the jury on the necessity of defendant warning plaintiff unless the danger attendant on the moving of the wagon was obvious. It is submitted that whatever characteristics this wagon had were as open and obvious to the plaintiff as to the defendant, and this is an undisputed fact. There is no evidence in the record that the wagon in question was any different from other wagons of its kind or that the principle of its construction was different from that of wagons in general; it is not shown that there was anything at all peculiar about it; that it was defective in any way; or that there was anything about it or its operation which would make it dangerous for men to move it which was known or which should have been known to the defendant and which was not known or could not, with the reasonable exercise of his powers of observation, have been known to the plaintiff or anybody else of ordinary intelligence; and there is no claim that plaintiff lacked intelligence. He was, at the time of the accident, a man 35 years of age. He was familiar with heavy wagons. He testified that he drove ice wagons for two years (R., pp. 9, 11), and knew from his experience that if the front wheel of a wagon encountered a stone or other obstruction it would turn the tongue (R., p. 11); that in his experience in driving he had seen one of the front wheels hit a stone and knew what happens under such circumstances with reference to the tongue (R., p. 11), and he knew that to keep the front wheels straight the tongue would have to be held (R., p. 10). So, it is apparent there was nothing to warn the plaintiff of which he did not already know.

"There is no duty of warning and instruction if the employee's duties are simple, and the danger obvious, or if by any other means he possesses knowledge of the risk to which he is subjected. The rule requiring the employer to instruct his employee and to warn him of danger is only for the purpose of supplying him with information which he is not presumed to have." * * *

"The employee is presumed to see and understand all dangers that a prudent and intelligent person of the same age and experience, and with the same capacity for estimating their significance, would see and understand, and if he neglects to observe and consequently remains in ignorance of perils of the employment the fault is his own, not that of the employer." 18 Ruling Case Law, 570.

"The employee assumes, as matter of law, any risk within the comprehension of any adult of ordinary intelligence, irrespective of the question whether he had or had not any special experience or training in the work in which he is engaged." 4 Labatt's Master & Servant, Secs. 1312, 1313.

Whether within or without the work, the master is not liable where the danger, if any, is as obvious to the employee as to the master. This principle is stated by numerous authorities, a few of which may be cited:

"It is held that a servant cannot recover for an injury caused by a risk which was apparent or obvious or so open and manifest that an ordinary man under the same circumstances could have ascertained it by the exercise of reasonable diligence; so also it is held that no action is maintainable where the servant had, as compared with the master, an equal or a better opportunity to see and know the extent of the danger." 4 Labatt's Master & Servant, Sec. 1386.

"A servant assumes the risk of any danger which is plain, open, and apparent to his mind, *although engaged in doing extra work or work outside the scope*

of his employment." C. R. I. & P. Ry. vs. Kinnare, 190 Ill., 9.

"If the servant is of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such case the master is not liable for injury happening to a servant in the performance of dangerous work *without the scope of his engagement for service merely because he has been directed by the master to perform such work.*" Reed vs. Stockmyer, 74 Fed., 186. (See also Cole vs. C. & N. W. Ry., 71 Wis., 121).

"When a servant is temporarily engaged in more hazardous work than that for which he is employed, he takes upon himself all such risks incident to the work as are equally open to the observation of himself and master. The mere fact that an accident occurs and a person is injured thereby, does not of itself entitle him to recover in an action for personal injuries received, nor does it prove that the injury was caused by the negligence of the defendant in the action." *No. Chicago Street Ry. Co. vs. Conway*, 76 Ill. App., 621.

In that case the Court had submitted to the jury the question of whether the work in which plaintiff was engaged was without the scope of his employment, and this was one of the errors assigned on the appeal, appellant (defendant below) insisting that there was no evidence upon which the instruction of the Court could be based. The Appellate Court held that as the facts were not in dispute, the question should not have been submitted to the jury. On the subject of the necessity of warning, the Court said, p. 624:

"It is said that appellee had no warning of the danger of his employment as coupler. Here again there was no evidence tending to show any dangers not as obvious to appellee as to the company."

In *Railroad Company vs. Fort*, 17 Wall., 533, a leading case, as establishing the liability of the master in ordering

a young boy to perform a dangerous piece of work with which he was not at all familiar, outside the work for which he was engaged, said as to an adult:

"If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service."

Plaintiff in his brief (p. 7) takes the position that he assumed only the risks of things within his contemplation at the time he was engaged. There is nothing to show that he was engaged for any stated time or that he was employed for service other than as a laborer at a daily wage. The case of *St. Louis Cordage Co. vs. Miller*, 126 Fed., 495, cited by plaintiff in support of his contention, is clearly and wholly contrary to any such view. In that case the Court, at page 501, said:

"A servant is not compelled to begin or continue to work for his master. Ordinarily, he does not work for him under a contract for a stated time. He is at liberty to retire from his employment, and his master is free to discharge him, at any time. The latter constantly offers him day by day his wages, his place of work, and the appliances which he is to use. The former day by day voluntarily accepts them. By continuing the acceptance of the work and the wages he voluntarily accepts and assumes the risk of defects and dangers which a person of ordinary prudence in his place would have known."

If it is the position of the plaintiff that there was no danger in the mere moving of the wagon by the men, but

the danger was one which arose suddenly and without warning after the men had started away with it, that situation was fully covered by the charge of the Court to the jury (R., p. 27), where the Court said:

If "the danger was one that occurred afterwards, suddenly occurred, then a different question might be presented, and he (plaintiff) might be excusable for not appreciating the danger. If you find that it was a risk he did not assume, that it was not obvious, and was not appreciated by him, and that he had no reason to appreciate it, until it was too late for him to get out of his predicament, then you would have a right to resolve that question in favor of the plaintiff.

"What was the situation? When did the danger first arise? And when it did arise, was he in such a position, and was the situation and progress of the wagon such that he had any election and choice about it? Could he have gotten out, or did he have to hang on and go on in the position where he was?

"You understand, of course, that the claim of the plaintiff is that the latter is the true situation with respect to it, and when the danger did arise, it was too late for him to save himself. But that is a question of fact for you, keeping in mind that he was bound to exercise reasonable care for himself, under the contributory negligence rule, and also that he assumed the obvious risks of his employment, so far as it was reasonable for him to abandon the work at a given stage when he appreciated the danger."

V.

It has been shown that not only is it clear that there is nothing in the record to support the claim of plaintiff that assisting in the removal of the empty wagon was not within the scope of his employment, but that his own testimony and that of the other witnesses in the case show conclusively that it was, and that the lower Court was right in so holding.

And whether it was or was not within the scope of plaintiff's employment, the risk attendant upon it under the circumstances was as open and obvious to him as it was to the defendant. The case went to the jury after hearing all the evidence and full and accurate instructions by the learned Court below, in which he covered in a particularly careful manner the subject of the duty of the defendant to furnish a sufficient number of employees, the lack of which plaintiff charged in his declaration as the direct and proximate cause of the accident.

It is respectfully submitted that the verdict returned by the jury should not be disturbed.

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